



Antitrust-Related Recent Developments: DOJ settles gun-jumping case, FTC issues fines for failure to submit HSR filing

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The companies, Flakeboard America Limited and SierraPine Limited, are sellers of particleboard, an unfinished wood product widely used in countertops, shelving and other finished products. They entered into an agreement on January 13, 2014, for Flakeboard to acquire three mills from SierraPine for \$107 million, with the intention that Flakeboard would close down one of the plants after obtaining antitrust clearance. The companies made HSR filings with the antitrust agencies. The DOJ issued a Second Request to further investigate the competitive impact of the transaction, which eventually led to the companies abandoning the proposed transaction on September 30, 2014.

During the waiting period, however, a labor dispute arose that required public disclosure of the planned mill closing. This, in turn, allegedly led to the company coordinating its closure of the mill on March 13, 2014, and migration of the mill's customers to Flakeboard. According to the DOJ Competitive Impact Statement, SierraPine provided Flakeboard with competitively sensitive information, including customer lists, contact information and purchase order history, which was shared with Flakeboard's sales employees. The companies coordinated the public announcement of the mill's closure and instructed SierraPine's sales employees to notify customers that Flakeboard sought their business and would match the existing price terms. Flakeboard also offered assurances of future employment to key SierraPine sales employees for directing the mill's customers to Flakeboard.

The DOJ viewed the conduct as a per se illegal agreement between competitors to reduce output and allocate customers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and a

premature transfer of ownership before expiration of the waiting period in violation of Section 7A of the Clayton Act, 15 U.S.C. § 18a. The consent decree requires the companies to each pay \$1.9 million in civil penalties and Flakeboard to disgorge profits earned as a result of the closing of SierraPine's mill during the antitrust waiting period (approximately \$1.15 million). The civil penalty amounts were reduced from the maximum of \$3.568 million for cooperation with the investigation and voluntary production of evidence. This included entering into a timing agreement to complete production and allocating time for the DOJ to complete their investigation despite the accrual of civil penalties of up to an additional \$16,000 per day for being in continuous violation of the HSR Act (pursuant to 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1)).

FTC fines investor \$896,000 for failure to file an HSR notification in connection with the conversion of notes into voting securities

The Federal Trade Commission (FTC) fined Berkshire Hathaway Inc. \$896,000 in connection with allegations that the company violated the HSR Act by failing to file an HSR notification for the conversion of notes into voting securities. Berkshire Hathaway acquired notes in USG Corporation in 2008, which were subsequently converted into voting securities in December 2013. The conversion resulted in Berkshire Hathaway exceeding the applicable size-of-transaction threshold, since no HSR filing exemptions were applicable.

This was at least the second time that Berkshire Hathaway submitted a corrective filing to comply with the HSR Act. The company's previous violation came on June 25, 2013, when it failed to report its acquisition of voting securities of financial services company Symetra. Berkshire Hathaway submitted a corrective HSR filing on July 2, 2013, characterizing its failure to comply as inadvertent. The FTC did not pursue a civil penalty in that case, but required Berkshire Hathaway to institute an effective HSR compliance program.

This second violation, however, led to the imposition of civil penalties. The director of the FTC's Bureau of Competition, Deborah Feinstein, stated that "[t]he Commission requires compliance with the premerger notification rules, and will not hesitate to seek civil penalties against companies or individuals that fall short of their filing responsibilities. Although we may not seek penalties for every inadvertent error, we will enforce the rules when the same party makes additional mistakes after promises of improved oversight. Companies and individual investors alike should ensure that they have an effective program in place to monitor compliance with HSR filing requirements."

FTC settles with patent assertion entity to prevent future deceptive conduct that would trigger penalties of up to \$16,000 per letter

Patent assertion entities (PAEs), sometimes referred to as nonpracticing entities or, derisively, as “patent trolls,” generate revenue by acquiring and enforcing intellectual property rights against potential infringers. PAEs have different patent enforcement incentives from companies that develop and/or sell commercial products. A PAE’s unique structure enables it to aggressively pursue royalty licensing agreements in circumstances where a producing company, which may face counterclaims of infringement, might not.

There is substantial scholarly disagreement over whether PAE activities in general harm competition. Without getting into that thorny issue, the FTC and the state attorneys general pursued enforcement against one PAE, MPHJ Technology Investments, LLC, because it allegedly engaged in deceptive assertions of patent infringement and phony legal threats. MPHJ sent thousands of letters to small businesses around the United States asserting that the companies were infringing its patents related to network computing technology and proposing settlement payment terms. Allegedly, the letters misrepresented the number of settlements MPHJ had entered with other alleged infringers and the terms under which other companies had settled the patent infringement claims.

On November 6, 2014, the FTC entered into a consent order that prohibits MPHJ from engaging in future deceptive conduct and triggers a penalty of up to \$16,000 per patent assertion communication that is misleading or unsubstantiated. This includes misrepresentations relating to the number of settlement agreements already entered into or the value of the other settlement agreements. The consent order also imposes recordkeeping requirements for patent assertion communications issued by MPHJ for a period of five years. The director of the FTC’s Bureau of Consumer Protection, Jessica Rich, stated that “Patents can promote innovation but a patent is not a license to engage in deception. Small businesses and other consumers have the right to expect truthful communications from those who market patent rights.”

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